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Supreme Court, U. S.

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No. 96-272

In The
Supreme Court of the United States
October Term, 1996

METROPOLITAN STEVEDORE COMPANY,

Petitioner,

v.

JOHN RAMBO and DIRECTOR, OFFICE OF WORKERS'
COMPENSATION PROGRAMS, UNITED STATES
DEPARTMENT OF LABOR,

Respondents.

On Writ Of Certiorari To The
United States Court Of Appeals
For The Ninth Circuit

RESPONDENT RAMBO'S BRIEF ON THE MERITS

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QUESTIONS PRESENTED

1. Is a nominal continuing award an appropriate mechanism under the Longshore and Harbor Workers' Compensation Act to incorporate the possible future effects of a medical disability where an injured employee's actual earnings do not fairly and reasonably represent the employee's wage-earning capacity?
2. If a nominal continuing award is authorized by the Act, was the decision of the Court of Appeals in this case to remand for entry of such an award within its statutory authority?

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STATUTORY PROVISIONS INVOLVED

Section 8(h) of the Longshore and Harbor Workers' Compensation Act (LHWCA or Longshore Act) provides as follows:

(h) The wage earning capacity of an injured employee in cases of partial disability under subdivision (c)(21) of this section or under subdivision (e) of this section shall be determined by his actual earnings if such actual earnings fairly and reasonably represent his wage-earning capacity: Provided, however, That if the employee has no actual earnings or his actual earnings do not fairly and reasonably represent his wage-earning capacity, the deputy commissioner may, in the interest of justice, fix such wage-earning capacity as shall be reasonable, having due regard to the nature of his injury, the degree of physical impairment, his usual employment, and any other factors or circumstances in the case which may affect his capacity to earn wages in his disabled condition, including the effect of disability as it may naturally extend into the future.

33 U.S.C. 908(h).

Section 21(c) of the LHWCA states in pertinent part:

(c) Any person adversely affected or aggrieved by a final order of the Board may obtain a review of that order in the United States Court of Appeals for the Circuit in which the injury occurred, by filing . . . a written petition praying that the order be modified or set aside. . . . Upon such filing, the court shall have jurisdiction of the proceeding and shall have the power to give a decree affirming, modifying, or setting aside,

in whole or in part, the order of the board and enforcing same to the extent that such order is affirmed or modified. . . .

33 U.S.C. 921(c).

STATEMENT

The Respondent, John Rambo, ("Rambo") a longshoreman, injured his back and leg within the course and scope of his employment on September 9, 1980, while employed by Petitioner, Metropolitan Stevedore Company ("Metropolitan").

Rambo filed a claim with the United States Department of Labor and trial was set before an Administrative Law Judge ("ALJ") in 1983. At the trial the parties stipulated among other things:

"That the employee sustained an over-all current permanent partial disability equivalent to 22 1/2% of the whole person which the parties recognize as an 'economic disability' producing a weekly wage loss of \$102.24 per week with an equivalent compensation rate of \$80.16 per week for permanent partial disability."

On November 28, 1983 the ALJ issued a Decision and Order awarding benefits to Rambo at the rate of \$80.16 per week for permanent partial disability.

On October 30, 1989, Metropolitan filed with the Department of Labor an "Employer's Application For Modification, Section 922."

A Formal Hearing on the Modification was convened on October 15, 1990 by the ALJ.

At the outset of the proceeding Claimant moved to dismiss on the grounds that the Petition was unsupported by evidence of a change in Rambo's physical condition. In reliance on existing case law and this Motion, Rambo presented no evidence. In support of its Petition Metropolitan offered only Rambo's post injury earnings. Metropolitan called Rambo as the only witness.

Rambo's testimony was uncontroverted that his physical condition had not changed since the Stipulated Award issued in 1983; and, that his permanent partial disability reduced his ability to perform his pre-injury work. Rambo also testified that he was presently employed as a longshore crane operator, was earning more than he had before his injury and that he did not know how long the crane job would last.

The ALJ ruled that Rambo's new job was a "change in conditions" that supported modification and terminated Rambo's benefits. The Benefits Review Board ("BRB") affirmed. Rambo appealed to the Ninth Circuit Court of Appeals.

The Court of Appeals reversed the BRB in the belief that the "change in conditions" requirement for an award modification under Section 922 required proof that Rambo had undergone a change in his physical condition.

This Court reversed, holding "that a disability award may be modified under Section 22 . . . without any change in the employee's physical condition." *Metropolitan Stevedore Co. v. Rambo*, 115 S. Ct. at 2150. This Court then remanded the case "(b)ecause Rambo raised other arguments before the Ninth Circuit that the panel

did not have the opportunity to address." *Id.* Emphasis added.

The two issues raised by Rambo and not decided were:

(1) Should the employer be estopped from filing a 33 U.S.C. Section 922 Petition for Modification because of the representation of its attorney to "Rambo" that the award would be paid for life?

(2) Given the 1983 Stipulated Decision and Order of Permanent Disability Benefits, "in the interest of justice", should this case be remanded for the entry of a nominal award of loss of wage earning capacity?

The Court of Appeals reviewed the entire record. In a split decision, the Court held that Metropolitan could seek modification of the prior award of permanent partial disability benefits because, "... reliance on Metropolitan to Rambo's detriment" was not established by the record.

In a unanimous decision the Court of Appeals stated that the propriety of a nominal award was properly before it on appeal. The Court cited *Young v. Todd Pac. Shipyards Corp.*, 17 BRBS 201, 204 n.2 (1985).

The Court next addressed the propriety of a nominal award in a modification proceeding and stated that the issue had not been determined by the Ninth Circuit. The Court stated, "The Second, Fifth and District of Columbia Circuits have ruled that nominal awards may be used to

preserve a possible future award where there is a significant physical impairment without present loss of earnings." *Rambo v. Director, Office of Workers' Compensation Programs*, 81 F.3d 840, 843 (9th Cir. 1996).¹

The Court reviewed 33 U.S.C. 922 and noted that it provides that compensation cases may be reviewed and a new compensation order issued which terminates, continues, reinstates, increases or decreases an award, at any time prior to one year after the date of last payment of compensation or the rejection of the claim.

In reviewing 33 U.S.C. Section 908(h), the Court emphasized the statutory language that, "... The deputy Commissioner may, in the interest of justice, fix such wage earning capacity as shall be reasonable, having due regard to the nature of his injury, the degree of physical impairment, his usual employment, and any other factors or circumstances in the case which may affect his capacity to earn wages in his disabled condition, including the effect of disability as it may naturally extend into the future." *Rambo v. Director, Office of Workers' Compensation Programs*, 81 F.3d at 844.

¹ In *Randall v. Comfort Control, Inc.*, 725 F.2d 791 (D.C. Cir. 1984) the District of Columbia Court of Appeals exhaustively analyzed the interrelationship between Section 922 and Section 908(h), and authorized a nominal award.

In *LaFaille v. B.R.B.*, 864 F.2d 54 (2nd Cir. 1989) the Director, OWCP, argued to the Court that Section 908(h) permitted de minimus awards and the court agreed.

In *Hole v. Miami Shipyards*, 640 F.2d 769 (5th Cir. 1981), the Court reviewed both Section 922 and Section 908(h) and held that the statutory scheme permitted de minimus awards.

The Court noted that, "This section (908(h)) 'allows the (ALJ) to consider the future effect of a disability'." (citing *Todd Shipyards v. Allan*, 66 F.2d 399 (9th Cir. 1982), cert denied, 459 U.S. 1034, 103 S. Ct. 444, 74 L. Ed. 2d 600, Citing *Hole v. Miami Shipyard Corp.*, 640 F.2d at 772.) *Rambo v. Director, Office of Workers' Compensation Programs*, 81 F.3d at 844.

After reviewing all of the evidence the Court HELD that:

"Looking at the evidence as a whole, the ALJ's Decision to terminate Rambo's benefits is NOT supported by substantial evidence and the BRB erred in affirming the ALJ's Order". *Rambo v. Director, Office of Workers' Compensation Programs*, 81 F.3d at 844. (Emphasis added).

Finally, the Ninth Circuit Court of Appeals:

1. Concluded quoting the ALJ in *Hole v. Miami Shipyards Corp.*, 640 F.2d at 773 (5th Cir. 1981), that, "... a small award fashioned expressly for the purpose of preserving (Rambo's) right to receive compensation should disability in an economic sense ever visit him." was appropriate in this case; and,
2. Remanded for entry of a nominal award.

SUMMARY OF ARGUMENT

In order to determine whether or not an injured employee suffers a permanent partial disability under Section 8(c)(21) of the Longshore Act, it is first necessary to determine the post-injury wage-earning capacity of

that employee. Section 22 of the Act concerns the subject of Modifications of Awards and its language makes no reference to and offers no guidance whatsoever in the determination of wage-earning capacity. By contrast, Section 8(h) of the Act deals exclusively with the determination of wage-earning capacity. The legislative history demonstrates that Congress enacted Section 8(h) to "... clarify the interpretation to be placed upon the words 'wage-earning capacity' used in the Act in connection with partial-disability cases ..." because of "... wasteful litigation ..." regarding "... the complex question of the proper factors to be considered in connection with the determination of an employee's wage-earning capacity after injury." H.R. Rep. No. 1945, 75th Cong. 3d Sess. 5-6 (1938); S. Rep. No. 1988, 75th Cong. 3d Sess. 5-6 (1938). The broad language of Section 8(h) clearly displays Congress' intent that the potential future effects of an employee's injury, along with any other factors or circumstances which may affect the capacity to earn wages, be considered in this determination if actual earnings do not fairly and reasonably represent the employee's wage-earning capacity. The one-year time limitation on *modification* requests contained in Section 22 is *irrelevant* to this determination except insofar as the potentially harsh effect of this limitations period prompted Congress to specifically include "forward looking" language in Section 8(h).

Contrary to Petitioner's assertions, benefit awards based upon the possibility of future economic harm after consideration of all relevant factors (medical and other) are appropriate under the Act and authorized by the language of Congress in Section 8(h) precisely *because*

such awards prevent the triggering of the one-year limitations period. A continuing nominal award is, in fact, perfectly suited to incorporate possible future economic effects of an injury in furtherance of the goals of Section 8(h) and to allow for modification as conditions change as envisioned by Section 922.

In this case the Court of Appeals properly conducted an independent review of the entire record to determine if the decision of the ALJ was supported by substantial evidence. It concluded that there was not substantial evidence to support complete termination of the claimant's benefits based upon this review. The Court cited to a number of facts contained in the record including the uncontroverted evidence that Rambo's permanent partial disability reduced his ability to perform his pre-injury work, that Rambo's physical condition remains unchanged, and that he didn't know how long his current higher paying job would last. Given these facts, the Court of Appeals concluded that a nominal continuing award was appropriate, especially in a modification proceeding such as Rambo's where the claimant has already been given an award based on a finding of permanent partial disability. The decision of the Court of Appeals in this case epitomizes the type of forward looking award authorized by Section 8(h). Despite the Director's claim to the contrary, the decision to remand for entry of a nominal continuing award was also well within the authority of the Court of Appeals. Congress expressly conferred upon the Circuit Courts the "... power to give a decree affirming, modifying, or setting aside, in whole or in part ..." the orders which they are bound to review and the power of "... enforcing same to the extent that such

order is affirmed or modified ... " Therefore, the decision of the Court of Appeals to remand for entry of a nominal continuing award was soundly within its statutory authority. (33 U.S.C. 921(c)).

ARGUMENT

- A. WHERE THE ACTUAL, POST-INJURY EARNINGS OF AN INJURED EMPLOYEE DO NOT FAIRLY AND REASONABLY REPRESENT THE EMPLOYEE'S WAGE-EARNING CAPACITY, A CONTINUING NOMINAL AWARD IS A REASONABLE AND JUST MECHANISM TO FIX THE WAGE-EARNING CAPACITY OF THE EMPLOYEE WITH DUE REGARD FOR THE FACTORS SET FORTH BY CONGRESS IN 33 U.S.C. 908(h).**

In enacting 33 U.S.C. 908(h), Congress recognized that actual post-injury earnings may not always fairly and reasonably represent the wage-earning capacity of an injured employee. In such cases, 33 U.S.C. 908(h) clearly expresses the intent of Congress that wage-earning capacity may be fixed or set by considering factors such as the nature of the injury, the degree of physical impairment, the usual employment of the employee, and any other factors which may affect the capacity to earn wages by the injured worker in his or her disabled condition, including the effect of disability as it may naturally extend into the future. Realizing that consideration of these types of factors could never yield a precise, mathematical calculation of wage-earning capacity, Congress further instructed that the wage-earning capacity may be

set "in the interest of justice" and "as shall be reasonable." 33 U.S.C. 908(h). The broad language of Section 908(h) plainly creates a liberal and benevolent approach which may be used for setting the wage-earning capacity of an injured employee.

Thus, although disability under the LHWCA may be, "... in essence an economic, not a medical concept..." (*Metropolitan Stevedore Co. v. Rambo*, 1155 S. Ct. 2144, 2147 (1995)), in cases where the actual post-injury earnings do not fairly and reasonably represent wage-earning capacity, Congress intended that medical factors such as current and anticipated future physical impairment may be used as a guide to approximate wage-earning capacity over a claimant's lifetime. This is obviously no easy task. As the District of Columbia Court of Appeals stated:

"... we recognize the onerous burden placed on the ALJ by the Act. The Act requires omniscience. The ALJ must divine whether the claimant will suffer any injury-related reduction in wage-earning capacity at any time during his lifetime. Often, as in this case, the ALJ will be asked to make this determination at a time when the existence and degree of any reduction in earning capacity is not evidenced by a tangible reduction in current wages paid."

Randall v. Comfort Control, Inc., 725 F.2d 791, 799 (D.C. Cir. 1984).

In grappling with this "onerous burden", every Circuit Court that has considered this issue has approved the use of nominal or de minimis continuing awards. In the cases of *Hole v. Miami Shipyards Corp.*, 640 F.2d 769 (5th Cir. 1981) and *Randall v. Comfort Control, Inc.*, supra,

the claimants suffered a serious medical disability but had actual post-injury earnings which were higher than their pre-injury earnings. In *Randall*, supra, the ALJ terminated benefits and the Benefits Review Board affirmed this decision. The District of Columbia Court of Appeals reversed, finding that the ALJ's decision to terminate was not supported by substantial evidence on the record as a whole because the ALJ's opinion focused almost entirely on the fact that the claimant had higher post-injury wages and because the ALJ did not make explicit findings on all relevant aspects of the wage-earning capacity determination or respond to uncontroverted evidence submitted by the claimant. The Circuit Court then indicated that it adopted the approach of the Fifth Circuit in *Hole v. Miami Shipyards Corp.*, supra, and stated:

"When it is clear that a claimant has suffered a medical disability and there is a significant possibility that the claimant will at some future time suffer economic harm as a result of his injury, but present circumstances make the extent of the economic injury unknowable, the beneficent purposes of the Act, and the mandate that due concern be given to 'the effect of disability as it may naturally extend into the future', 33 U.S.C. Sec. 908(h), are furthered by granting a 'small award, fashioned expressly for the purpose of preserving a claimant's right to receive compensation should disability in an economic sense ever visit him'."

Randall v. Comfort Control, Inc., supra, 725 F.2d at 800 (D.C. Cir. 1984) (citing *Hole v. Miami Shipyards Corp.*, supra, 640 F.2d at 773).

Contrary to Petitioner's assertions, a continuing nominal award is not a fiction and does not award the claimant compensation to which he is not entitled. Where actual earnings do not fairly and reasonably represent wage-earning capacity, Congress has stated that the method used to determine wage-earning capacity may take into account the nature of the injury and the degree of physical impairment including the effect of disability as it may naturally extend into the future. If it is determined that the nature of the injury and degree of physical impairment have produced a serious *medical* disability and that this medical condition may naturally tend to degenerate or worsen over the course of a claimant's lifetime so that there is a significant possibility of future economic harm, a continuing nominal award is the only reasonable mechanism available to comply with the "forward looking" mandate of Section 908(h). Such an award is *not* a fiction but rather an educated assumption of future economic disability based upon known medical facts. Thus, a nominal award is an appropriate mechanism, especially in a modification proceeding such as Rambo's where the claimant has already been given an award for loss of wage earning capacity based upon a medically established permanent partial disability.

Rambo v. Director, OWCP, 81 F.3d 840, 844 (9th Cir. 1996).

B. A CONTINUING NOMINAL AWARD IS CONSISTENT WITH THE INTENT OF CONGRESS AS EXPRESSED IN THE LANGUAGE AND LEGISLATIVE HISTORY OF THE LHWCA AND IS NOT IN CONFLICT WITH THE LIMITATIONS PERIOD OF 33 U.S.C. 922.

Petitioner attempts to convince this Court that any reading of Section 908(h) which allows a continuing nominal award "wrecks the statutory scheme" and conflicts with other specific sections of the Longshore Act. In fact, the language of Section 908(h) easily allows (and perhaps encourages) continuing nominal awards in appropriate cases and such a reading does not conflict with the language of the other sections cited by Petitioner. As this Court has repeatedly stated, "... When a statute speaks with clarity to an issue judicial inquiry into the statute's meaning, in all but the most extraordinary circumstances, is finished." *Metropolitan Stevedore Co. v. Rambo*, 115 S. Ct. 2144, 2146 (1995) (Citing *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 475, 120 L. Ed. 2d 379, 112 S. Ct. 2589 (1992); *Demarest v. Manspeaker*, 498 U.S. 184, 190, 112 L. Ed. 2d 608, 111 S. Ct. 599 (1991)). Section 908(h) is quite articulate regarding the issue of wage-earning capacity in cases where the injured employee's actual earnings are not fairly and reasonably representative. It coherently expresses Congress' intent that a "forward looking" perspective be used in the determination of wage-earning capacity in such a case. In addition, the legislative history demonstrates that a reading of Section 908(h) which allows continuing nominal awards is perfectly consistent with the comprehensive scheme of the Longshore Act. Finally, if there is any doubt as to the clarity of the

statutory provisions in issue, the Director, OWCP, has argued that continuing nominal awards are consistent with the provisions of the Act and this interpretation is entitled to deference.

As set forth above, the broad language of Section 908(h) allows the deputy commissioner (or an ALJ in disputed cases) to fix or set the wage-earning capacity of an injured employee "in the interest of justice" and "as shall be reasonable" with due regard to medical factors such as the nature of injury, the degree of physical impairment and the effect of disability as it may naturally extend into the future. To further emphasize the broad discretion conferred by Section 908(h), Congress stated therein that consideration could be given to "... any other factors or circumstances in the case which may affect his capacity to earn wages in his disabled condition." 33 U.S.C. 908(h). Congress did *not* add any proviso, limitations or qualifications to this language. It did not state that the determination of wage-earning capacity (and therefore any award of benefits) must be based upon any sort of formula or mathematical calculation. Even Petitioner must admit that this language allows for a continuing award of *any* dollar amount after consideration of the proper factors so long as it is "reasonable." Once this analytical threshold has been crossed, Petitioner's argument is reduced to the assertion that a nominal award is somehow unreasonable because it is not a particular dollar amount. Although the legislative history will be reviewed below to demonstrate that Congress did not consider such awards to be unreasonable, the Fifth Circuit Court of Appeals provided perhaps the most telling response to such an argument when it stated:

"... we believe that a small award, fashioned expressly for the purpose of preserving Claimant's right to receive compensation should disability in its economic sense ever visit him, seems far less arbitrary than picking a 'disability' figure out of thin air." *Hole v. Miami Shipyards*, 640 F.2d 769, 773 (5th Cir. 1981) (citations omitted).

Petitioner's cursory attempt to create conflicts between this reading of Section 908(h) and other sections of the Act must likewise fail. Without setting forth the actual text of the sections involved, Petitioner impliedly argues that any reading of Section 908(h) which would allow continuing nominal awards conflicts in some unspecified way with 33 U.S.C. 902(10) and 33 U.S.C. 908(c)(21). (Petitioner's Brief on the Merits, p. 15). In fact, 33 U.S.C. 902(10) states:

"Disability means incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment."

Importantly, the text of Section 902(10) does *not* further define what factors should be used to determine if an employee in fact has an "incapacity" to earn wages or whether the determination should be made only with regard to present wages or the anticipated future wages of the employee. This is because Congress left the further definition of wage earning capacity (and by inference "incapacity") to Section 908(h). Clearly, by the language of Section 908(h), Congress intended the definition of "incapacity" to earn wages to include *future* incapacity as well as present.

The text of 33 U.S.C. 908(c)(21) states:

"In all other cases in this class of disability,² the compensation shall be 66 2/3 per centum of the difference between the average weekly wages of the employee and the employee's wage-earning capacity thereafter in the same employment or otherwise payable during the continuance of such partial disability. . . ."

Once again this section does not state what factors should be used to define the terms "wage earning capacity" or "during the continuance of partial disability". Once again, Congress further elucidated these terms in the later Section 908(h) – specifically authorizing the consideration of future effects of injury or disability in the determination of wage-earning capacity. In this light, "partial disability" obviously continues (despite the fact that actual earnings may currently be the same or higher than pre-injury earnings) if there is a significant possibility that the nature of the injury or degree of physical impairment will cause future economic loss. Although Petitioner takes pains to distinguish between the terms "injury" and "disability", Petitioner, perhaps somewhat disingenuously, fails to recognize that Congress has stated that actual post-injury wages are not always equivalent to wage-earning capacity. According to Petitioner's reading of the Act, partial disability and incapacity to earn wages automatically ends whenever an employee's actual earnings meet or exceed pre-injury earnings. Petitioner's arguments regarding the inappropriateness of

² By using the term "in this class of disability" Congress was referring to unscheduled injuries such as Rambo's back injury.

nominal continuing awards must fail because they ignore completely the "forward looking" language of Congress in Section 908(h).

The legislative history of the Longshore Act provides further support that such awards are consistent with the comprehensive scheme of the Act. In fact, the pertinent committee reports clearly show that Congress amended the Act in 1938 to add Section 908(h) precisely because it was concerned that the beneficent purpose of the Act might be defeated by the one-year limitation period for modification if the future effects of an industrial injury were not taken into consideration. The Congressional Report states that Section 908(h):

" . . . provides for consideration of the effects of an injury causing permanent partial disability, upon the employees *future ability to earn*. The proposed changes have been made with the view to having wage-earning capacity determined upon considerations which the courts have found to be just and proper. Often an employee returns to work earning for the time being the same wages as he earned prior to injury, although still in a disabled condition and with his opportunity to secure gainful employment definitely limited. . . . It is clear that in such a case the employee's ability to compete in the labor market has been definitely affected; and, though at present, the employee is paid his former full-time earnings, he suffers permanent partial disability which should be compensable under the Longshoremen's Act, considering not only the present effect of the disability on the employee's wage-earning capacity, but also the future consequences of such disability on the

employee's capacity to earn as it naturally extends into the future. The Longshoremen's Act should provide that the Deputy Commissioner may consider all of the factors which the more recent trend of decisions indicates are the logical and proper factors in the determination of wage-earning capacity.

In a case such as that referred to above where the employee returns to employment without apparent wage loss, *notwithstanding impairment of physical condition and probable impairment of future wage-earning capacity* an unscrupulous employer might with profit to himself continue the original wages, particularly if low, until the **limitations in the act** with respect to the filing of claim for compensation and right of review of the case (§ 22) had run, after which time the employee's right to compensation would be barred and the employee if then cast adrift would become and remain an object of charity. It can be seen that an unscrupulous employer might thus *defeat the beneficent provisions of the Longshoremen's Act.*"

H.R. Rep. No. 1945, 75th Cong. 3d Sess. 5-6 (1938); S. Rep. No. 1988, 75th Cong. 3d Sess. 5-6 (1938). (Emphasis added).

Congress obviously perceived that Section 922's one-year time limitation on modification could work an injustice in cases where actual post-injury earnings do not fairly and reasonably represent an injured worker's wage-earning capacity. Thus, while Congress chose not to generally discard Section 922's time limitation it amended the Act and added Section 908(h) to mitigate its effect and to allow for the consideration of the future effects of

injury in appropriate cases. Contrary to Petitioner's assertions, therefore, where the nature of the injury, degree of physical impairment, or possible future effects of an injury so warrant, a nominal continuing award (which allows for modification as future events unfold) is *NOT* in conflict with Section 922 and is fully consistent with the intent of Congress. Petitioner mis-characterizes the situation when it states, "To Rambo, the Director, and the Ninth Circuit, Section 8(h) is a wild card which may be played to trump Section 22's time limitation whenever a court believes it appropriate to extend a claimant's right to modification indefinitely." (Petitioner's Brief on the Merits, p. 15). There is no inherent inconsistency in the two sections. The legislative history shows that Congress *itself* intended Section 908(h) to modify the method of determining wage-earning capacity to account for the anticipated future effects of injury and thereby prevent the injustice that would otherwise result if the award was based solely on actual earnings and modification was time barred after one year due to Section 922.

In proposed amendments to the Act in 1983 and 1984 the Committee on Labor and Human Resources recommended a new approach which would have eliminated both the one-year time limitation on requests for modification of Section 22 and the phrase "as it may naturally extend into the future" from Section 908(h). The resulting statutory framework would have eliminated a need for continuing awards running into the future because the one-year limitations period would be eliminated. The language in Report No. 98-81 (May 10, 1983) at Pg. 37 makes it clear that Congress was aware of the fact that

nominal continuing awards had been used by ALJ's for some time:

" . . . This Amendment promotes equity permitting all parties to apply for modification of awards at any time after an award is entered. The one-year limitation was unreasonably short in light of the long term effects of the major industrial injuries sustained by workers covered by the Act. As a consequence, Administrative Law Judges felt compelled to award benefits for wage loss at the rate of **one percent** in cases where rejection of the claim would have required a request for modification within a year, whether or not such a new claim was justified. The new approach is far more realistic, allowing claimants for example, to apply for increased benefit for wage loss or for greater physical disability at a time when full effects of an injury may manifest themselves. Requests for modification will no longer be necessary simply to keep the statute of limitation from running."

The Committee on Labor and Human Resources Report No. 98-81 (May 10, 1983) p. 37.

Petitioner states that Rambo and the Director ignore " . . . the fact that the legislative history offers no clue about Congress' reasons for rejecting the proposed repeal of both provisions and the fact that the proposals themselves resulted from a perception that nominal wards were a problem . . . " (Petitioner's Brief on the Merits, p. 15). It is respectfully asserted that Petitioner is incorrect on both counts. It is Petitioner who ignores the logical inferences from the language of the Committee's Report and the inaction of Congress. From that language it is

quite apparent that Congress knew of the fact that nominal continuing awards were being issued by ALJs as a consequence of the one-year time limitation in Section 22. If Congress considered nominal awards to be a problem why then didn't it make some amendments or changes to the existing statutory framework forbidding such awards - if not in 1983 then sometime in the thirteen years that followed? Obviously, Congress did *not* perceive such awards as a problem and did not want to encourage the yearly filing of requests for modification " . . . simply to keep the statute of limitation from running . . . " that would inevitably follow if nominal awards were eliminated. *Id.*

Finally, the Director, OWCP, has consistently argued that continuing nominal awards are proper under the Longshore Act. (See *LaFaille v. B.R.B.*, 884 F.2d at 62 (2nd Cir. 1989); Brief for the Director, Office of Workers' Compensation Programs, p. 16). The Director, OWCP, through a delegation of powers from the Secretary of Labor, is the Administering Agency for the LHWCA. As such, the Director's interpretation of the Act is entitled to deference under the principles announced in *Chevron, U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-843 (1984).

C. IN THIS CASE THE COURT OF APPEALS PROPERLY CONDUCTED AN INDEPENDENT REVIEW OF THE RECORD TO DETERMINE IF THE ALJ'S DECISION TO TERMINATE BENEFITS WAS SUPPORTED BY SUBSTANTIAL EVIDENCE.

In performing its review function the Court of Appeals is required to ". . . conduct an independent review of the record to determine if the ALJ's findings are supported by substantial evidence." *Stevenson v. Linens of the Week*, 688 F.2d 93, 97 (D.C. Cir. 1982). See also *Janusiewicz v. Sun Shipbuilding & Dry Dock Co.*, 677 F.2d 286, 290 (3d Cir. 1982); *Avondale Shipyards, Inc. v. Vinson*, 623 F.2d 1117, 1119 n. 1 (5th Cir. 1980). After conducting this independent review of the record the Court of Appeals in this case stated:

"In ruling that Rambo no longer had a wage-earning capacity loss and terminating his award, the ALJ overemphasized Rambo's current status and failed to consider the effect of Rambo's permanent partial disability on his future earnings. Looking at the evidence as a whole, the ALJ's decision to terminate Rambo's benefits is not supported by substantial evidence and the BRB erred in affirming the ALJ's order."

Rambo v. Director, Office of Workers' Compensation Programs, 81 F.3d 840, 844 (9th Cir. 1996). In support of its finding that the ALJ's decision to terminate benefits was not supported by substantial evidence, the Court of Appeals set forth important evidentiary facts from the record:

"Here the evidence is uncontroverted that Rambo's permanent partial disability reduced

his ability to perform his pre-injury work. This wage-earning capacity loss was sufficient to support a weekly benefits award. Rambo's physical condition remains unchanged."

Id. 81 F.3d at 844.

Contrary to Petitioner's assertions, Rambo and the Court of Appeals can and do seriously argue that the ALJ's determination that Rambo no longer has a wage earning capacity loss is unsupported by substantial evidence. Once again, Petitioner mistakes actual earnings for wage-earning capacity and attempts to convince this Court that because Rambo's earnings are higher than before his injury this means that his right to recover benefits in the future should automatically be terminated. This simply is not consistent with the "forward looking" perspective and language of Section 908(h).

Further, the ALJ's decision to terminate benefits cannot be adequately defended on the assumption that he simply determined that Rambo's actual post-injury wages *do* reasonably and fairly represent his wage-earning capacity. First, nowhere in his opinion does the ALJ make this statement. Second, the Benefits Review Board has held that the same "forward looking" factors which must be considered in setting the wage-earning capacity of a worker whose actual earnings do not fairly and reasonably represent his wage-earning capacity must also be considered in the initial determination of whether or not the actual earnings are representative. *Devillier v. National Steel & Shipbuilding Co.*, 10 BRBS 649, 660-661 (1979). This holding by the Benefits Review Board Service was based upon Section 8(b) of The Administrative Procedure Act, 5

U.S.C. 557(c) which requires an ALJ to make explicit findings on all relevant aspects of a determination.

In the case at bar the ALJ failed to consider or make explicit findings concerning the effect that the nature of Rambo's injury, the degree of his physical impairment, or his reduced ability to perform his pre-injury work might have on Rambo's *future* capacity to earn wages. The ALJ's decision contains no real explanation or analysis of what the evidence demonstrated regarding the rate of inflation or the salary increases for longshore workers during the period in question.³ The ALJ simply states that he took these factors "... into consideration ..." (J.A. 55). For this reason, the Ninth Circuit correctly determined that the decision of the ALJ to completely terminate benefits was not supported by substantial evidence.

D. THE DECISION OF THE COURT OF APPEALS TO REMAND FOR ENTRY OF A NOMINAL AWARD WAS A PROPER EXERCISE OF ITS AUTHORITY PURSUANT TO 33 U.S.C. 921(c).

Section 21(c) of the LHWCA states in pertinent part:

"Any person adversely affected or aggrieved by a final order of the Board may obtain a review of that order in the **United States Court of Appeals** for the Circuit in which the injury occurred, by filing ... a written petition praying

³ In fact, the transcript of the Modification Hearing demonstrates that the ALJ sustained the objection of Rambo's counsel to evidence submitted by Metropolitan in the form of testimony in a prior, unrelated case regarding the yearly basic longshore pay increases. (J.A. 22-23).

that the order be modified or set aside. . . . Upon such filing, the court shall have jurisdiction of the proceeding and **SHALL HAVE THE POWER TO GIVE A DECREE AFFIRMING, MODIFYING, OR SETTING ASIDE, IN WHOLE OR IN PART, THE ORDER OF THE BOARD AND ENFORCING SAME TO THE EXTENT THAT SUCH ORDER IS AFFIRMED OR MODIFIED . . .**" 33 U.S.C. 921(C) (Emphasis added).

The District of Columbia Court of Appeals has characterized Section 21(c) as vesting "broad authority" in the Courts of Appeals. *Burns v. Director, OWCP*, 41 F.3d 1555, 1564-1565 (1994).

The language of Section 21(c) allows an Appellate Court to modify orders in whole or in part and to enforce its decision "... to the extent that such order is affirmed or modified."

In this case the Court of Appeals simply modified the order to terminate benefits by granting a nominal award and enforced this modification by remanding for entry of that nominal award. Therefore, the decision was squarely within the jurisdiction and authority granted to the Court of Appeal by Congress in Section 921(c).

◆

CONCLUSION

The judgment of the Court of Appeals should be affirmed. The language of Section 8(h) clearly expresses the intent of Congress that the future effects of industrial injuries should be taken into consideration when determining wage-earning capacity and issuing an award. The one-year time limitation of Section 22 is inapplicable to

the determination of wage-earning capacity and is in no way inconsistent with a continuing award of any size. A continuing nominal award is the best method yet devised to satisfy the important goals of both Section 8(h) and Section 22. The legislative history establishes that Congress intended the "forward-looking" perspective of Section 908(h) to mitigate the potentially harsh effects of the limitations period of Section 22 and that, at least as early as 1983, Congress was aware of the practice of ALJs issuing nominal continuing awards. Congress chose *not* to amend the Act to forbid such awards and this Court should likewise resist Petitioner's invitation to do so.

Respectfully submitted,

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